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# In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

*v.*

ANTHONY M. ROSSI, ET AL.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTION PRESENTED

Whether the word "treaty" in 5 U.S.C. (Supp. III) 7201 note, which prohibits employment discrimination against United States citizens on military bases overseas unless permitted by "treaty," encompasses all binding international agreements concluded by the President with the host country or is limited to agreements consented to by the Senate pursuant to Article II, Section 2 of the Constitution.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Secretary of Defense and the Secretary of the Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

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* The other petitioner is Secretary of the Navy John F. Lehman, Jr. The other respondents are Cindy L. Perry, Malinda Frierson, Fred E. Bumgarner, Camela Banks, Edna Horvath, Paul Chapman, Kenneth E. Oyler, James Vinson, A. H. Schilot, George Marshall, Herb Allen, Robert Wolbert, Rex W. Thomas, Elizabeth Taylor, Susan Keyes, Carroll E. Mason, Carlos F. Garcia, Clarence Labak, Richard Anderson, Beulah M. Jones, Pilar Galvin, Beverly Walker Pratt, Harold E. Shrader, Doris M. Chaisson, Karen S. Knapp, Patricia Procter, Gertrude A. Stevens, Arthur P. Fernandez, and Cynthia A. Roybal.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 642 F.2d 553. The opinion of the district court (App. B, *infra*, 20a-39a) is reported at 467 F. Supp. 960. The administrative decision of the Navy (App. C, *infra*, 41a-45a) is not reported.

## JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 46a-47a) was entered on September 15, 1980. A petition for rehearing was denied on December 18, 1980 (Apps. E & F, *infra*, 48a-49a). On March 13, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to May 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. (Supp. III) 7201 note, provides:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

## STATEMENT

1. In 1944 Congress authorized the President, "[a]fter negotiation with the President of the * * * Philippines * * * [and] by such means as he finds appropriate [,] to withhold or to acquire and to retain such [military and naval] bases, necessary appurtenances to such bases, and the rights incident thereto * * * as he may deem necessary for the mutual protection of the Philippine Islands and of the United States." 22 U.S.C. 1392. Pursuant to this broad grant of authority and to its Filipino counterpart, in 1947 the United States and the Republic of the Philippines entered into a 99-year Military Bases Agreement (MBA), 61 Stat. 4019, T.I.A.S. No. 1775, which grants the United States the use of various military facilities in the Philippines and in which certain commitments were made by the United States. This agreement has been amended periodically, most recently on January 7, 1979 (30 U.S.T. 863, T.I.A.S. No. 9224).

The major American military installations currently operating in the Philippines pursuant to the MBA are Clark Air Base and the Naval Facility at Subic Bay. Wallace Air Station, John Hay Air Base and San Miguel Naval Communications Station serve as supporting facilities. Clark Air Base supports United States air operations in the Western Pacific and East Asia, and Subic Bay supports the Seventh Fleet's operations in the Western Pacific and Indian Ocean. Together these facilities comprise the logistics hub for United States operations in Southeast Asia, the Southwest Pacific and the Indian Ocean areas and perform a significant range of essential services not available elsewhere in the region.

The United States' continued use of these facilities depends in large part on respect for the Philippines' sovereignty and on stable labor relations with local employees. The MBA itself, however, contains no provisions concerning the employment of local nationals by the United States Armed Forces. To fill this void, and to assure a stable and reliable local workforce necessary to American defense interests in the Pacific, the United States and the Philippines negotiated a Base Labor Agreement (BLA), 19 U.S.T. 5892, T.I.A.S. No. 6542, on May 27, 1968, as a supplement to the MBA (see App. G, *infra*, 50a-62a). Article I of the BLA provides, *inter alia*, for the preferential employment of Filipino citizens at military facilities used by the United States in the Philippines (*id.* at 51a):

> *Preferential Employment.*—The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed. Exception is permitted, however, in the case of third country nationals already employed on the date of entry into force of this Agreement and in the case of technical personnel of third country nationality as envisaged in paragraphs 1 and 2, Article XI of the Military Bases Agreement of 1947, as amended.

2. In 1971, Congress enacted Pub. L. No. 92-129, Section 106, 85 Stat. 355, now codified at 5 U.S.C.

(Supp. III) 7201 note.[1] Section 106 prohibits discrimination against American citizens and dependents of members of the United States Armed Services at Department of Defense installations and facilities in foreign countries, unless such discrimination is permitted or required by "treaty." At the time Section 106 was enacted, the United States was a party to more than a dozen binding international agreements that, like the BLA, provided some form of employment preference for local nationals but were not "treaties" within the meaning of Article II, Section 2 of the Constitution.[2] Since the passage of Section

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[1] Section 106 was previously codified at 5 U.S.C. 7151 note. The opinions and briefs below cite the prior codification.

[2] Article II, Section 2, Clause 2 provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; * * *."

In addition to the BLA, the following agreements were in effect at the time Section 106 was enacted: Mutual Defense Assistance Agreement, Nov. 21, 1956, United States-Republic of China, 7 U.S.T. 3411, 3412, T.I.A.S. No. 3713 (¶ 4); Defense Agreement Concerning Construction of Scatter Wave Radio Facility in Vicinity of Yangmingshan, Taiwan, Aug. 6, 1958, United States-Republic of China, 13 U.S.T. 2136, 2137, T.I.A.S. No. 5175 (¶ 2); Defense Agreement Concerning Construction of Communications Facility in Vicinity of Kaohsiung, Taiwan, Apr. 15, 1960, United States-Republic of China, 13 U.S.T. 2155, T.I.A.S. No. 5176; Defense Agreement Concerning Construction of Scatter Wave Control Facility in Vicinity of Yangmingshan, Taiwan, Feb. 28, 1962, United States-Republic of China, 13 U.S.T. 2158, T.I.A.S. No. 5177; Agreement Concerning the Status of United States Armed Forces in the Republic of China, Aug. 31, 1965, United States-Republic of China, 17 U.S.T. 373, 375, T.I.A.S. No. 5986 (Art. III.3); Agreement Concerning the Status of United States Personnel and Property (Annex), May 8, 1951, United States-Iceland, 2 U.S.T. 1533, 1542, T.I.A.S. No. 2295 (Art. VI); Agreement Concerning

106, the United States has entered into several additional international agreements that afford hiring preferences to citizens of host countries but are not Article II treaties.[3] We are advised by the Department of State that no Article II treaty ever has

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Bahamas Long Range Proving Ground: Administrative Arrangements Regarding Sites in Ascension Island, Aug. 24-25, 1959, United States-United Kingdom, 10 U.S.T. 1453, 1454, T.I.A.S. No. 4296; Agreement Concerning Oceanographic Research Stations in the Bahama Islands, May 12, 1960, United States-United Kingdom, 11 U.S.T. 1405, 1406, T.I.A.S. No. 4479; Agreement Concerning Atlantic Undersea Test and Evaluation Center in the Bahama Islands, Oct. 11, 1963, United States-United Kingdom, 14 U.S.T. 1431, 1441, T.I.A.S. No. 5441 (Art. IX); Agreement Concerning Defense Areas, Feb. 10, 1961, United States-West Indies, 12 U.S.T. 408, 413, T.I.A.S. No. 4734 (Art. VI); Agreement Concerning Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, United States-United Kingdom, 18 U.S.T. 28, 30, T.I.A.S. No. 6196 (¶ 7(a)); Memorandum of Understanding for the Establishment of the SEATO Clinical Research Center, Apr. 1 & 25, 1963, United States-Thailand, 14 U.S.T. 459, 462, T.I.A.S. No. 5340 (Art. IV.2), as amended; Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, United States-Australia, 14 U.S.T. 506, 520, T.I.A.S. No. 5349 (Art. 15).

[3] Agreement Implementing Article V of the Treaty of Friendship and Cooperation, Jan. 31, 1976, United States-Spain, 27 U.S.T. 3095, 3128, T.I.A.S. No. 8361 (Art. XXXIII); Agreement Concerning Defense Areas and Facilities, Dec. 14, 1977, United States-Antigua, 29 U.S.T. 4183, 4187, T.I.A.S. No. 9054 (Art. VI); Agreement Concerning a Tracking Station of Mahe Island, June 29, 1976, United States-Seychelles, 27 U.S.T. 3709, 3721, T.I.A.S. No. 8385 (Art. XXIII); Agreement for Cooperation on Defense and Economy between the United States and Turkey, Supplementary Agreement Number 3 on Installations, Mar. 29, 1980, Art. VI (not yet published).

addressed the subject of preferential hiring of local nationals at military facilities used by the United States abroad.

3. In March 1978, respondents Rossi, Bumgarner, Frierson and Perry were notified that their jobs as game room managers at the United States Naval Facility at Subic Bay were being converted to local national positions in accordance with Article I of the BLA and that they would be discharged from their employment with the Navy (App. B, *infra*, 21a). Respondent Rossi filed what he styled as a "class action" administrative complaint, alleging that the Navy's termination of respondents constituted unlawful discrimination against American citizens in violation of Section 106 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (App. B, *infra*, 22a; A. 226-232).[4] The Equal Employment Opportunity Office of the Navy rejected the complaint, concluding that it had no authority to modify the BLA (App. C, *infra*, 41a-45a). In June 1978, respondent Rossi appealed to the Civil Service Commission Appeals Review Board (A. 233).

While the administrative appeal was pending, the four respondents were notified that their employment was to be terminated ahead of schedule pursuant to a reduction in force (App. B, *infra*, 23a). Asserting jurisdiction under the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(3), and 28 U.S.C. 1331(a) and 1343(4), respondents sought a temporary restraining order enjoining petitioners from discharging them and barring them from the base. The United States District Court for the District of Columbia granted the restraining order, but subsequently de-

[4] "A." refers to the joint appendix filed in the court of appeals.

nied respondents' motion for a preliminary injunction (App. B, *infra*, 23a).

On cross motions for summary judgment, the parties agreed that the validity under Section 106 of respondents' discharge depended on whether the word "treaty" encompasses binding international agreements such as the BLA or is limited to treaties in the constitutional sense—*i.e.*, agreements consented to by the Senate in accordance with Article II. The district court concluded that "treaty" as used in Section 106 should be construed in the broader international law sense (App. B, *infra*, 20a-39a). The court rejected respondents' contention that Congress' mere use of the word "treaty" in the statute is dispositive, noting (*id.* at 29a) that several courts, including this Court (see *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912)) "have held that executive agreements were 'treaties' within the meaning of an Act of Congress," and that Congress' imprecise drafting of Section 106 buttressed the conclusion that the word was not intended to have a restricted meaning (App. B, *infra*, 30a). In addition, the court found (*id.* at 33a-34a) that "the legislative history would argue against [respondents'] contention that Congress intended to ban all discrimination on military bases abroad, even when pursuant to an agreement between nations."

In reaching this conclusion, the district court recognized (App. B, *infra*, 37a) that it was treading "in an area fraught with sensitivity and affecting foreign affairs of the United States." The court observed (*id.* at 36a) that there were 12 international agreements with hiring preferences for local nationals at overseas American bases in effect when Section 106 was passed, that none of these agree-

ments had been submitted to the Senate for its advice and consent, and that two more such agreements were added after the enactment of Section 106. Because these hiring preference provisions were part of the *quid pro quo* for the retention of American use of military facilities in foreign countries, the court concluded that it "should not lightly infer a Congressional intent to overturn portions of fourteen international agreements in the absence of *any* legislative history suggesting such an intent" (*id.* at 37a; emphasis in original).[6]

4. The court of appeals reversed (App. A, *infra*, 1a-19a). The court of appeals acknowledged (*id.* at 8a-9a; footnote omitted) that "although the term 'treaty' under United States law normally connotes an agreement requiring the ratification of the Senate under article II of the Constitution, * * * it does not invariably carry such a meaning" and that "[t]he meaning to be attributed to the word 'treaty' ultimately depends upon the intent of Congress in enacting the particular provision in which the term appears." The court of appeals also observed, after a review of the legislative history, that "the evidence [of congressional intent] is not extensive" (*id.* at 14a). Nonetheless, the court concluded that Congress used the word "treaty" in Section 106 in its Article II sense and that it accordingly intended, *sub silentio*, to abrogate local preferential hiring provisions in

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[6] Based on its conclusion that the BLA is a "treaty" within the meaning of Section 106, the district court also held (App. B, *infra*, 37a-38a) that the specific provision in Section 106 permitting discrimination against American citizens in employment at overseas bases controls over the more general prohibitions against employment discrimination in Title VII. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976); *Morton* v. *Mancari*, 417 U.S. 535 (1974).

more than a dozen existing international agreements. In the court's view (App. A, *infra*, 15a n.30), Section 106 partially repealed the 1944 Act authorizing the President to negotiate and conclude agreements with the Philippines "by such means as he finds appropriate" (see page 3, *supra*), by withdrawing one method as inappropriate—agreements to employ local nationals in preference to United States citizens or dependents of United States service members for civilian positions on overseas military bases, unless such agreements were consented to by two-thirds of the Senate.[6]

## REASONS FOR GRANTING THE PETITION

The decision of the court of appeals invalidates a key provision of this country's Base Labor Agreement with the Republic of the Philippines and threatens the security and continued existence of United States military bases in that nation. Moreover, the decision below casts doubt on a dozen other international agreements containing local national employment preferences that were negotiated by the President as part of an effort to maintain an American military presence on foreign soil. This holding, if allowed to stand, could seriously disrupt United States relations with several foreign countries. Because it is unlikely that Congress would have intended these drastic results without saying so, and because the decision below is inconsistent with rules of statutory construction that have been well established by this Court, further review is warranted.

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[6] In view of its conclusion that the BLA is not a "treaty" within the meaning of Section 106, the court of appeals did not address the question whether the BLA hiring preference provision violates Title VII (App. A, *infra*, 19a n.36).

1.a. Although the court of appeals purported (App. A, *infra*, 5a) to base its decision in part on the "[c]ustomary usage of the term 'treaty' in the United States," it correctly concluded (*id.* at 9a) that Congress' use of the word "treaty" in Section 106 was not dispositive of the issue before it. Thus, while the court remarked (*id.* at 7a) that "under United States law, 'treaties' normally are thought of as one specific category of international agreements requiring a particular procedure and having a particular status," it acknowledged (*id.* at 8a-9a; footnote omitted) that the word "treaty" "does not invariably carry such a meaning." The question is solely one of legislative intent.[7]

In *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912), for example, this Court considered whether the word "treaty" in the Circuit Court of Appeals Act of 1891, 26 Stat. 826, 828, which provided for direct appeal to this Court in cases involving the construction of treaties, included international agreements not consented to by the Senate. The agreement in question, which concerned important commercial relations between the United States and France, had not been submitted to the Senate for approval pursuant to Article II of the Constitution. In holding that the agreement nonetheless was a "treaty" for purposes of the Circuit Court of Appeals Act, the

[7] Courts also sometimes use the word "treaty" in its broader international law sense rather than its constitutional sense. See, *e.g.*, *Natural Resources Defense Council* v. *NRC*, No. 80-1477 (D.C. Cir. Mar. 30, 1981), slip op. 14 n.15, in which Judge Wilkey (author of the opinion below) used the word "treaty" to refer to the Agreement for Cooperation Concerning Civil Uses of Atomic Energy, June 13, 1968, United States-Philippines, 19 U.S.T. 5389, T.I.A.S. No. 6522, which is not an Article II treaty.

Court looked to the legislative intent and concluded that Congress "thought [it] best to preserve the right to a review by direct appeal * * * in certain matters of importance, and, among others, those involving the construction of treaties. We think that the purpose of Congress was manifestly to permit rights and obligations *of that character* to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the Nation" (224 U.S. at 600-601; emphasis added).

Similarly, this Court has held that "all international compacts and agreements" are to be accorded a dignity similar to that of a treaty made with the advice and consent of the Senate for the purpose of determining whether state law can prevail over an international agreement. *United States* v. *Pink*, 315 U.S. 203, 222-223 (19[illegible]); *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937). In *Pink* and *Belmont*, the Court held that the Litvinov Assignment, by which the Soviet Union assigned certain claims to the United States as part of this nation's recognition of the Soviet government, although not approved by the Senate, had the effect of a treaty, thus making it supreme over the hostile laws and policy of New York State.

The Court of Claims also has construed international agreements as treaties for purposes of 28 U.S.C. 1502, which provides that that court shall not have jurisdiction over claims against the United States "growing out of or dependent upon any treaty entered into with foreign nations." See *Hughes Aircraft Co.* v. *United States*, 534 F.2d 889, 903 & n.17

(Ct. Cl. 1976); *Yassin* v. *United States*, 76 F. Supp. 509, 517 (Ct. Cl. 1948). The Court of Claims explained that "[t]he reason for this equation is that the fundamental separation-of-powers policy underlying § 1502, *i.e.*, to avoid undue judicial interference (*e.g.*, by construction of particular treaty terms and provisions) with the Executive Branch's conduct of foreign relations, is equally applicable to both forms of international compact." *Hughes Aircraft Co.* v. *United States*, *supra*, 534 F.2d at 903 n.17.

b. In light of this Court's decision in *B. Altman*, the court of appeals correctly concluded that Congress' use of the term "treaty" in Section 106 was not dispositive (App. A, *infra*, 9a). The court of appeals therefore based its holding on the concededly sparse legislative history. That legislative history, however, does not bear the court's reading of it. Indeed, the legislative record is more significant for what it does not contain—*any* expression of a congressional intent to abrogate the numerous existing agreements with allies providing preferences for the hiring of local nationals.

At the time Section 106 was enacted, at least 14 binding international agreements, none of which had been submitted to the Senate for approval, provided for local national hiring preferences or labor protections at military facilities in foreign countries used by the United States.[8] Nowhere in the legislative history of Section 106 is there any mention of these existing international agreements or any discussion of the impact that Section 106 would have on them. Nor was there any testimony concerning the anti-discrimination provision from the Department of

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[8] See note 2, *supra*.

State or the Department of Defense, as there surely would have been had the validity of the existing international agreements been subject to challenge. Perhaps more important, Congress obviously felt the need to include an exception for "treaties" in Section 106, yet the Article II format had never been employed to establish local national hiring preferences at military bases used by the United States abroad. Congress' failure to discuss the impact that Section 106 would have on the international agreements then in force, combined with the absence of any Article II treaties addressing the hiring preference issue, strongly suggests a legislative understanding that all agreements negotiated by the President and having the force of law in the international arena would be exempt from Section 106 by virtue of the "treaty" exception.[9]

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[9] Since the enactment of Section 106 in 1971, the United States has entered into at least four more international agreements that are not in the form of Article II treaties but that contain local national hiring preferences (see note 3, *supra*). Each of these agreements was submitted to Congress under the Case Act, 1 U.S.C. (Supp. III) 112b, which requires the Secretary of State to transmit to Congress any international agreement other than an Article II treaty to which the United States is a party (see note 11, *infra*). No Member of Congress has expressed concern to the Department of State that these agreements run afoul of Section 106.

Other post-enactment legislative history also shows that Congress is aware that the inclusion of hiring preferences in international agreements that have not been approved by the Senate has continued since the passage of Section 106. See, *e.g.*, H.R. Rep. No. 95-1398, 95th Cong., 2d Sess. 80 (1978) ("[f]oreign nationals are employed either directly or indirectly in virtually all countries where U.S. forces are deployed. The United States and the host country have administrative agreements (referred to as Status of Forces

Further evidence of Congress' intent is supplied by the scant legislative history that does exist. The provision that became Section 106 was part of an amendment to Pub. L. No. 92-129 sponsored by Senators Hughes and Schweiker. The amendment was generally concerned with reducing the extension of the draft and increasing military pay. The limited debate over Section 106 indicates that the provision apparently was prompted by a single incident that occurred in Europe. In early 1971, in an effort to reduce "spiraling wage costs," the Commanding General of the European Exchange System (EES), Gen. Charles H. Phipps, issued a statement encouraging all EES elements to recruit and hire local nationals. See 117 Cong. Rec. 14394-14397 (1971) (remarks of Sen. Schweiker); *id.* at 16128, 16133 (remarks of Sen. Schweiker).

Senator Schweiker's discussion of Section 106 focused on the Phipps memorandum and on the plight of American servicemen in Germany's expensive economy. 117 Cong. Rec. 14394-14397, 16128-16129, 16131-16133 (1971). These remarks indicate outrage at General Phipps' unilateral action, which Senator Schweiker viewed as insensitive to the economic circumstances of American soldiers and their families. General Phipps' action, however, was not mandated by any international agreement; indeed, it violated the Department of Defense policy embodied in the Dependent Hire Program. See also 117 Cong. Rec. 16133 (1971) (remarks of Sen. Schweiker). In addition, Senator Schweiker expressed

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Agreements) which define and prescribe requirements that the military departments are obligated to observe in satisfying their local civilian labor needs"). No legislative action has been taken, however, to alter that situation.

no intent to abrogate any international agreement calling for local national hiring preferences.

Moreover, the debates contain no mention of the local hiring situation in military installations used by the United States in countries outside of Europe. Specifically, there was no discussion of the bases in the Philippines or the hiring preference required by the BLA. This is not surprising, because Congress' concern with servicemen's cost of living in Europe, which is clearly reflected in the debates, would have had no application to the Philippines, where the cost of living is far below that in Europe.[10]

In support of its conclusion that Congress intended to eliminate all local hiring preferences, even if embodied in existing international agreements, the court of appeals relied primarily on a statement by Senator Hughes (App. A, *infra*, 14a) that wives of servicemen "are denied the opportunity to work on overseas bases, by agreement with the countries in which they are located * * *" (117 Cong. Rec. 16126 (1971)). But this isolated reference to "agreements," when viewed in context, refers not to local national hiring preferences (such as the BLA) extended pursuant to international agreements, but rather to provisions concerning the visa status of American military dependents. Senator Hughes' remark immediately follows his observation (*ibid.*) that servicemen "in the lowest ranks cannot have their wives obtain anything but a tourist visa" and

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[10] The committee reports' only mention of Section 106 is the statement that "[t]he purpose of this amendment is to correct a situation which exists *primarily on some American bases in Europe.*" S. Rep. No. 92-93, 92d Cong., 1st Sess. 23 (1971) (emphasis added); accord, H.R. Conf. Rep. No. 92-433, 92d Cong., 1st Sess. 31 (1971).

echoes Senator Cook's comments on the same point (*ibid.*):

> On my inquiry of the Defense Department, it was my understanding that there was an agreement, through the NATO organization, that those young wives, because they were there on tourist visas, could not get a work permit under any circumstances.

These concerns, as Senators Cook and Hughes recognized (117 Cong. Rec. 16126 (1971)), are distinct from the unilateral exhortation by General Phipps to hire local nationals, the incident that triggered the enactment of Section 106, and Section 106 does not purport to cover the visa problem (*ibid.*). The visa status of military dependents in the host country is a different question entirely from the employment preferences mandated by international agreements. Even if dependent spouses and children could obtain a work permit, that would not change the requirement under the BLA or similar international agreements that certain positions on the base must be made available to citizens of the host country. Senator Hughes' statement thus is irrelevant to the problem addressed by Section 106 and sheds no light on the proper interpretation of the word "treaty." [11]

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[11] The court of appeals also relied (App. A, *infra*, 16a-18a) on the fact that the same Congress that enacted Section 106 also passed the Case Act, 1 U.S.C. 112b, which, as originally enacted, required the Secretary of State to submit to Congress "the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has been entered into force with respect to the United States but in no event later than sixty days thereafter." But Congress' use of the word

c. The court of appeals' conclusion that Section 106 indicates a congressional intent to abrogate important provisions of several international agreements not only is based on an erroneous reading of the legislative history but also ignores the settled rule of statutory construction that repeals by implication are not favored. *United States* v. *Will*, No. 79-983 (Dec. 15, 1980), slip op. 20; *TVA* v. *Hill*, 437 U.S. 153, 189 (1978). As the Court remarked in *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974):

> The courts are not at liberty to pick and choose among congressional enactments, and

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"treaty" in the Case Act is not controlling in this wholly different context.

First, it is hardly surprising that Congress would distinguish between Article II treaties and other international agreements in a statute requiring the submission of documents by the Executive, because submission of the former category of documents to the Senate was already required by the Constitution. Moreover, while the court below admitted (App. A, *infra*, 17a) that "the general subject matter treated in the two enactments is not the same," it drew on what it thought "may have been" "a similar concern" of both statutes, that is, a congressional desire to check presidential power (*ibid.*). Such a concern does not appear to have played a part in the enactment of the Case Act (see 118 Cong. Rec. 4090-4091 (1972) (remarks of Sen. Case); *id.* at 4093 (remarks of Sen. Bentsen) ("[w]e do not want to tie the President's hands in his efforts to engage in foreign policymaking")), which, after all, only requires notice to Congress of international agreements *after* they have been concluded. In any event, there is no basis for assuming that a desire to check presidential power was the motivation for Section 106. It is unreasonable to believe that Congress, which was aware that most status of forces agreements with foreign nations were not in the form of Article II treaties, would have sought to control the executive branch by requiring only that one particular issue usually dealt with in such agreements must be in the form of an Article II treaty.

> when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.'" *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

The foregoing principle applies with special force where the allegedly repealed provision is a binding international obligation. This Court long ago held that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *." *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See also *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953). In the absence of a clear legislative intent, statutes thus are to be construed so that they do not conflict with existing provisions or obligations under Article II treaties or other agreements with foreign countries. See *Moser* v. *United States*, 341 U.S. 41, 45-46 (1951); *Clark* v. *Allen*, 331 U.S. 503, 510, 514 (1947); *Cook* v. *United States*, 288 U.S. 102, 120 (1933); *Restatement (Second) of Foreign Relations of the United States*, § 145, Comment b (1965); L. Henkin, *Foreign Affairs and the Constitution* 171 (1972).

The court of appeals disregarded these principles in holding that Congress intended Section 106 to amend the 1944 statute authorizing the President to negotiate "by such means as he finds appropriate" for the acquisition of military and naval bases in the Philippines and to abrogate important obligations of the United States to several other foreign nations.

Indeed, in contrast to the district court's sensitivity to these considerations, the court of appeals never even adverted to the adverse impact its decision would have on the United States' ability to negotiate and maintain crucial rights to use military facilities overseas, finding that these obligations were "exactly what Congress intended to nullify" (App. A, *infra*, 16a). Contrary to the court of appeals' conclusion, however, we submit that the legislative history of Section 106 falls far short of a "clear and manifest" congressional intent to abrogate this nation's international commitments.

2. As the district court noted (App. B, *infra*, 36a), the employment of local nationals is a significant *quid pro quo* for foreign countries to allow the United States to use military bases located on their soil. This is particularly true in the case of the Philippines. As the Department of State remarked in 1977, the question of civilian employment at the United States bases in the Philippines "has long been a sensitive one. The Government of the Philippines believes that at military bases on Philippine territory it is appropriate that Filipino citizens be employed to the maximum extent possible. The Government of the Philippines has been adamant on that point, and the limited exceptions provided for in Article I of the Base Labor Agreement are the only concessions it has been willing to grant in this respect." Letter from Kempton B. Jenkins, Acting Assistant Secretary of State for Congressional Relations, to Senator Henry M. Jackson, dated Feb. 7, 1977 (A. 211).

The court of appeals' ruling in this case has already sparked a hostile reaction in the Philippines. For example, an editorial in the Manila Evening

Post (Oct. 2, 1980), published shortly after the decision below, stated:

> The action of the U.S. Appellate Court, in taking exception to the validity of the executive agreement on the hiring of Filipino workers for U.S. military bases in this country, is unfortunate and if followed by the U.S. government will most certainly place the bigger question of the agreement, not a treaty, on the activation of U.S. military bases here, in peril. In effect, the Appellate Court's decision puts the U.S. out on a limb as far as the presence of U.S. bases here is concerned.
>
> * * * * *
>
> Certainly, this country will have every right to end the agreement if one of its most important provisions is nullified.[12]

Thus, the court of appeals' decision, unless reversed, will hamper the United States' ability to negotiate for and maintain base rights and other military advantages in the Philippines and elsewhere.[13] These

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[12] The United States employs more than 13,000 Filipino citizens at its military facilities in the Philippines. Department of Defense Total Civilian Personnel Strengths By Regional Area and By Country—Military Functions Summary (Dec. 31, 1980), Table P309B, at 2. The Department of the Navy advises that the decision of the court of appeals has not escaped the notice of Filipino labor leaders, who have called for strikes if the job security of the local nationals employed at the military facilities is threatened. We note that the ship repair facility at Subic Bay is of vital importance to the readiness of the Seventh Fleet and Indian Ocean task forces that defend American interests in the Middle East, the Indian Ocean and the Pacific. Labor unrest at Subic Bay thus would have a direct and significant adverse impact on the United States' ability to respond militarily in this potentially volatile area.

[13] The Article II treaty process is time consuming and may not be feasible in some situations. Moreover, the Department

serious adverse consequences warrant this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1981

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of State advises that foreign countries frequently may wish to avoid the formality and high visibility of a treaty. The decision below, which would require every international agreement containing local national hiring preference provisions to be in the form of an Article II treaty, thus substantially reduces negotiating flexibility.

APPENDIX A

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 79-1485

ANTHONY M. ROSSI, *et al.*, APPELLANTS

*v.*

HAROLD BROWN, Secretary of Defense, *et al.*, APPELLEES

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Appeal from the United States District Court for the District of Columbia

(Civil Action No. 78-2346)

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Argued 15 April 1980

Decided 15 September 1980

Before: MCGOWAN and WILKEY, *Circuit Judges*, and DAVIES *, *Senior United States District Judge* for the District of North Dakota.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: Section 106 of Public Law No. 92-129 prohibits discrimination against United States citizens in the employment of civilian person-

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

nel on United States military bases overseas, unless such discrimination is permitted by "treaty."[1] This case presents the narrow question of whether the Base Labor Agreement of 1968 between the United States and the Republic of the Philippines,[2] which provides for preferential hiring of local nationals at United States military bases in the Philippines, is a "treaty" within the meaning of section 106.

Resolution of this question turns on whether the word "treaty" set forth in the statute is intended to refer only to international agreements entered into by the President with the advice and consent of two-thirds of the Senate or whether it refers in a broader sense to any international agreement entered into between the United States and the governments of other nations. The district court concluded that the latter interpretation was correct and accordingly entered summary judgment for the Government.[3] We reverse, finding on the basis of the plain language of the statute and the legislative history that the term "treaty" was used in the sense set forth in article II of the Constitution—that is, an international agreement made by the President with the advice and consent of two-thirds of the Senate.

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[1] *See* Act of 28 Sept. 1971, Pub. L. No. 92-129, § 106, 85 Stat. 348, 355 (codified at 5 U.S.C. § 7151 note (1976)). For text of the provision, see text accompanying note 7 *infra*.

[2] The official title of the agreement is the Agreement Relating to the Employment of Philippine Nationals in the United States Military Bases in the Philippines, 27 May 1968, United States-Philippines, [1968] 19 U.S.T. 5892, T.I.A.S. No. 6542, *reprinted in* Joint Appendix (J.A.) at 170. The agreement more commonly is known as the Base Labor Agreement, and that usage will be followed here. For text of the relevant portion of the agreement, see text accompanying note 5 *infra*.

[3] *See Rossi* v. *Brown*, 467 F. Supp. 960 (D.D.C. 1979).

## I. BACKGROUND

The essential facts are not in dispute; we review them briefly here.[4]

Article 1 of the Base Labor Agreement of 27 May 1968 between the United States Government and the Republic of the Philippines provides:

> The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed.[5]

In March 1978 four of appellants, who are United States citizens residing in the Philippines, were informed that pursuant to this agreement their positions as gameroom managers at the United States Naval Station, Subic Bay, in the Republic of the Philippines, thereafter would be filled only by Philippine citizens. Appellants subsequently filed an administrative complaint with an Equal Employment Opportunity Counselor challenging the validity of this action.

After failing to prevail at the administrative level, appellants on 13 December 1978 filed a complaint in the United States District Court alleging that the

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[4] *See id.* at 961-62.

[5] Base Labor Agreement, 27 May 1968, United States-Philippines, art. I, [1968] 19 U.S.T. 5892, 5892-93, T.I.A.S. No. 6542, *reprinted in* J.A. at 170, 170-71.

provision set forth in the Base Labor Agreement for hiring Filipino citizens in preference to United States citizens plainly contradicts section 106, Public Law 92-129 (Hughes-Schweiker amendment).[6] Section 106 provides in pertinent part:

> *Unless prohibited by treaty*, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States.[7]

Whether the preferential hiring mandate of the Base Labor Agreement is nullified by the qualified ban on employment discrimination against United States citizens set forth in section 106 necessarily depends upon the construction accorded to the word "treaty." Appellants contended below that Congress used the word "treaty" in section 106 in the sense set forth in article II of the Constitution: an international agreement made by the President with the advice and consent of two-thirds of the Senate. Under this construction, the parties agree, the Base Labor Agreement is not a treaty. The President never submitted the agreement to the Senate for ratification. Rather, it was negotiated by the President pursuant to a congressional authorization of 1944 to use "such means as he [the President] finds appropriate" to acquire and retain military bases in

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[6] Act of 28 Sept. 1971, Pub. L. No. 92-129, § 106, 85 Stat. 348, 355 (codified at 5 U.S.C. § 7151 note (1976)).

[7] *Id.* (emphasis added).

the Philippines.[8] The district court, however, agreed with the Government's contention that Congress intended the scope of the term "treaty" to encompass any binding agreement entered into between the United States and other nations. Accordingly, the court held that the Base Labor Agreement of 1968 was a "treaty" for purposes of section 106.

We reverse. Customary usage of the term "treaty" in the United States and the legislative history of section 106 persuade us of the validity of appellants' position.

## II. ANALYSIS

### A. *Customary Usage in the United States*

Under principles of international law, the word "treaty" ordinarily is used to refer to "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[9] The designation of "treaty" under in-

[8] The relevant portion of the Act provides: "After negotiation with the President of the . . . Philippines . . ., the President of the United States is authorized by such means as he finds appropriate to withhold or to acquire and to retain such bases, necessary appurtenances to such bases, and the rights incident thereto." Act of 29 June 1944, ch. 322, § 2, 58 Stat. 625, 626 (codified at 22 U.S.C. § 1392 (1976)). Pursuant to this statutory authorization, the United States and the Philippines entered into the Military Bases Agreement of 1947, United States-Philippines, 61 Stat. 4019, T.I.A.S. No. 1775, which has been the subject of periodic renegotiation, as well as the Base Labor Agreement, 27 May 1968, United States-Philippines, [1968] 19 U.S.T. 5892, T.I.A.S. No. 6542, *reprinted in* J.A. at 170.

[9] Vienna Convention on the Law of Treaties, 22 May 1969, art. 2(1)(a), *reprinted in* 63 AM. J. INT'L L. 875, 876 (1969). As the drafters of the Restatement of the Foreign Relations

ternational law thus encompasses within its scope all binding agreements entered into between nations regardless of the manner by which these agreements are brought into force.

Under the United States Constitution, the term "treaty" has a more specific and restricted meaning. Article II, section 2, clause 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." [10] It is without question that the President may enter into binding agreements with other nations without the advice and consent of the Senate,[11] and these types of agreements commonly are called "executive agreements." [12] Executive agreements are "treaties" under established canons of international law, but not under article II of the Constitution.

This distinction between treaties and other forms of international agreements is followed in the draft Restatement of the Foreign Relations Law of the United States. Section 302 of the Restatement provides:

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Law of the United States state, "[I]nternational law does not distinguish between agreements designated as 'treaties' and other agreements." RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory note 3, at 74 (Tent. Draft 1 Apr. 1980).

[10] U.S. CONST. art. II, § 2, cl. 2.

[11] *See, e.g., United States* v. *Belmont*, 301 U.S. 324, 330-32 (1937); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *B. Altman & Co.* v. *United States*, 224 U.S. 583, 600-01 (1912).

[12] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 178 (1972).

§ 302. Definitions: Law of the United States

(a) "Treaty" means an international agreement made by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring.

(b) Other international agreements, some times collectively referred to as "international agreements other than treaties," include "executive agreements pursuant to treaty," "Congressional-executive agreements [*i.e.*, executive agreements pursuant to congressional authorization] and "sole executive agreements." [13]

Thus under United States law, "treaties" normally are thought of as one specific category of international agreements requiring a particular procedure and having a particular status. According to this usage, the Base Labor Agreement at issue is an executive agreement, or more specifically, a "Congressional-executive agreement" [14]—that is, an international compact concluded by the President pursuant to congressional authorization to use "such means as . . . appropriate" to acquire and retain military bases in the Philippines—but not a "treaty."

In declining to apply this interpretation to section 106, the district court in part relied upon *B. Altman*

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[13] RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (Tent. Draft 1 Apr. 1980); *id.*, Introductory note 3, at 74.

[14] The Restatement defines the scope of a "Congressional-executive agreement" as follows: "The President may make an international agreement with the authorization or approval of Congress dealing with any matter that falls within the powers of Congress and of the President under the Constitution." *Id.* § 307.

*& Co.* v. *United States.*[15] In that case the Supreme Court construed the word "treaty" in the Circuit Courts of Appeals Act of 1891, which authorized a direct appeal to the Court in cases involving "the validity or construction of any treaty," [16] to encompass all international agreements regardless of the manner by which these agreements were brought into force. The Court relied upon the intent of Congress in establishing the provision: Congress deemed questions involving the interpretation of "treaties" to be of sufficient importance to justify direct review to the Court,[17] and the Court perceived no need to distinguish between treaties in the article II sense and other international agreements on that basis. All international compacts entailed binding rights and obligations, the construction of which could have significant bearing on this nation's relations with other nations.[18]

Thus although the term "treaty" under United States law normally connotes an agreement requiring the ratification of the Senate under article II of the Constitution, *Altman* indicates that it does not

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[15] 224 U.S. 583 (1912).

[16] Act of 3 Mar. 1891, ch. 517, § 5, 26 Stat. 826, 828 (originally codified at 28 U.S.C. § 345 (1926)).

[17] *See B. Altman & Co.* v. *United States,* 224 U.S. at 600.

[18] *See id.* at 600-01. The Court stated:

> We think that the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the Nation.

*Id.* at 601.

invariably carry such a meaning.[19] The meaning to be attributed to the word "treaty" ultimately depends upon the intent of Congress in enacting the particular provision in which the term appears. We move, then, to an examination of the purpose underlying section 106.

B. *Legislative History*

The legislative history of section 106 is not extensive, but the purpose of the section clearly is set forth in both the Senate and Conference Committee Reports. The Conference Report, for instance, provides:

> The Senate version [of the bill] contained a provision prohibiting job discrimination against

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[19] We note, however, that the other case that the district court relied upon for this proposition, *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972), is inapposite. That case involved the question whether the Military Bases Agreement of 1947, United States-Philippines, 61 Stat. 4019, T.I.A.S. No. 1775, an executive agreement formulated pursuant to congressional authorization, provided a sufficient basis for the exercise of extradition powers by the executive branch. The Supreme Court in *Valentine* v. *United States*, 299 U.S. 5, 9 (1936), previously held that the executive possesses no power to extradite fugitive criminals except such as is conferred by treaty or by act of Congress. The Eighth Circuit construed *Valentine* to mean that there need only be "a showing of some authority, whether in the form of congressional dictate or policy, or the provisions of an existing treaty, to provide a legitimate basis for the surrender of fugitives" by the United States to another nation. *William* [*sic*] v. *Rogers*, 449 F.2d at 521. The court found that the executive agreement in question, resting on a valid delegation of legislative authority, constituted a sufficient basis for the exercise of extradition powers by the executive branch. The court thus did not address the question whether the agreement was a "treaty."

> American citizens and their dependents in hiring on United States military bases in any foreign country.
>
> . . . .
>
> The purpose of the Senate provision is to correct a situation which exists at some foreign bases, primarily in Europe, where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardship for families of American enlisted men whose dependents are effectively prevented from obtaining employment.[20]

Concerned with the economic plight of American enlisted personnel and their dependents, Congress thus sought to eliminate the discrimination barrier preventing United States dependents from obtaining civilian positions on overseas military bases, unless such barrier expressly were authorized by "treaty."[21]

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[20] H.R. REP. No. 433, 92d Cong., 1st Sess. 31 (1971) (Conference Report). *See* S. REP. No. 93, 92d Cong., 1st Sess. 23 (1971).

[21] The exact language of the statute provides "[u]nless prohibited by treaty . . .," *see* text accompanying note 7 *supra*. The district court considered this language "confusing" and also "significant . . . in evaluating [appellants'] contention that Congress chose its words carefully and meant just what it said when it used the word 'treaty'." *Rossi* v. *Brown*, 467 F. Supp. 960, 965 (D.D.C. 1979). Replacing the phrase "[u]nless prohibited by" with either the words "unless permitted by" or "unless provided by" would convey more precisely the meaning of the statute, but we do not think that this awkward phrasing bears on congressional intent in selecting the word "treaty." That word is a term of art, the meaning of which Congress obviously was well aware.

What Congress really was saying by the words "[u]nless prohibited by treaty," as our review of the background of

After examining the legislative history and finding no explicit definition of the term "treaty," the district court was persuaded that Congress intended to eliminate discriminatory practices against American citizens arising only from ad hoc decisionmaking of individual commanders to give preference to local nationals and not from any international obligation on the part of the United States to hire local nationals; thus the district court interpreted the treaty exception to encompass all international agreements.

The court primarily based its conclusion upon the extended comments of Senator Schweiker, a sponsor of the amendment, concerning the policy of the commanding general of the Army Exchange System in Europe. The commanding officer in question issued a memorandum directing exchange system employees to hire local nationals rather than United States dependents or tourists because of the allegedly higher wage costs and higher turnover rates for United States citizens.[22] Decrying the general's action, Senator Schweiker stated at one point during the debates:

> I have never heard of anything so ridiculous in my life. We actually send our GI's to Europe

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the legislation makes clear, was "unless the Senate is consulted in regard to any permitted discrimination."

[22] The memorandum provides in relevant part:

> For the reasons outlined above, I desire that all European Exchange System elements in the months ahead emphasize the recruitment of local nationals and sharply de-emphasize the utilization of US dependents and tourists. Due to the high turnover in the latter category, I feel this transition can be made without actually separating any US personnel.

Memorandum from Brigadier General Charles Phipps (Jan. 1971), *reprinted in* 117 CONG. REC. 14,389, 14,395 (11 May 1971).

> at poverty wages. We do not pay to send the wives there. They [the GI's] get over there, and if they do bring their wives at their own expense, the wives cannot even go to the Army Exchange Service and get a job, because a general has sent out a memorandum that says we are going to give those jobs to the nationals of the countries involved.
>
> How ridiculous can one policy be? [23]

The court considered these and other similar comments on the commanding general's memorandum [24] to constitute the only significant discussion of section 106. The district court thus concluded that while the legislative history was not unambiguous, it credibly could be argued that "Congress had in mind only those instances of discrimination which resulted from the caprice of individual officers." [25]

We think that this is a constrained and erroneous view of congressional intent. First we note that the memorandum from the commanding general of the Army Exchange System was the only example referred to in the record of an officer issuing a mandate to discriminate against United States citizens in employment. And the debates later indicate that the Army had taken steps to ensure that this particular memorandum was rescinded.[26] While Con-

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[23] 117 CONG. REC. 14,389, 14,395 (1971) (remarks of Sen. Schweiker).

[24] *See, e.g., id.* at 14,397; *id.* at 16,120, 16,128 (remarks of Sen. Schweiker).

[25] *Rossi* v. *Brown*, 467 F. Supp. 960, 967 n.4 (D.D.C. 1979).

[26] This brings me to one more point. Since uncovering the memorandum I brought out a few days ago and read again today, whereby the commanding general of the

gress undoubtedly may have wished to prevent situations of this kind from arising in the future, that the particular problem referred to by Senator Schweiker was already being resolved, at least suggests that Congress by enacting section 106 had more in mind than just "the caprice of individual officers." Further scrutiny of the legislative record confirms this supposition.

At the time section 106 was being considered, twelve international agreements were in effect providing for preferential hiring of local nationals on United States military bases. None of these agreements had been submitted to the Senate for ratification.[27] In discussing the economic hardships facing

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European exchange system, General Phipps, had recommended that only local nationals be considered for these jobs, the Assistant Secretary of the Army, Roger Kelley, has personally taken over the investigation of this matter. He has assured me that they are going to rectify that particular memorandum, that that memorandum will from now on correspond to the alleged policy that has been operating over there for some time, of giving American nationals some preference.

117 CONG. REC. 16,120, 16,133 (1971) (remarks of Sen. Schweiker). Since 1961, as a later passage indicates, the official policy of the Department of Defense was to hire United States dependents to the maximum extent possible for civilian positions on overseas military bases. *See id.* The directive from the commanding general of the European Exchange System thus ran expressly contrary to official policy.

[27] *See, e.g., Rossi* v. *Brown*, 467 F. Supp. 960, 967-68 (D.D.C. 1979); Brief for Appellees at 19-20 & n.20. Since 1971 the United States has entered into two additional agreements with other countries which provide for preferential hiring of local nationals. Neither of these agreements has been ratified by the Senate. *See, e.g., Rossi* v. *Brown*, 467 F. Supp. 960, 968 (D.D.C. 1979).

American servicemen and their families, Senator Hughes, the other sponsor of the amendment, specifically referred to these agreements: "[T]hey [dependents of enlisted personnel] are denied the opportunity to work on overseas bases, *by agreement with the countries in which they are located*, and are forced to live in poverty."[28] Although the evidence is not extensive we take this statement on the part of a cosponsor of the amendment to be an unmistakable indication that Congress intended to abrogate those portions of the existing executive agreements providing for preferential hiring of local nationals.[29]

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[28] 117 CONG. REC. 16,120, 16,126 (1971) (remarks of Sen. Hughes) (emphasis added). The Government argues that Senator Hughes' statement probably refers to informal agreements by local base commanders with the host countries to give local nationals preference in hiring. *See* Brief for Appellees at 18 n.17. The record reflects, however, only one instance of a commanding officer directing the employment of local nationals in lieu of United States citizens, and this policy was formulated unilaterally by the officer, *see* note 23 *supra* and accompanying text—not by any "agreement" with the host country. Thus we think the word "agreement" plausibly could only be a reference to the international agreements providing for discrimination against United States citizens.

We note also that the preferential hiring policy of local nationals was only one obstacle preventing United States dependents from obtaining civilian positions on overseas military bases. In his remarks, Senator Hughes also expressed concern that the wives of enlisted men were unable to secure work permits in foreign countries. *See* 117 CONG. REC. 16,120, 16,126 (1971) (remarks of Sen. Hughes) ("[t]hose in the lowest ranks cannot have their wives obtain anything but a tourist visa").

[29] Senator Schweiker also quoted from a study prepared by two Army officers, which referred to the classification of civilian jobs for local nationals as one factor contributing to the economic hardship of United States enlisted men:

Thus we think that Congress sought to eliminate discrimination against American citizens owing not just to the ad hoc decisionmaking of particular commanders, but also owing to executive agreements between the United States and other countries providing for preferential hiring of local nationals. And *consistent with this purpose, Congress could only have intended the "treaty" exception to include an agreement made by the President with the advice and consent of two-thirds of the Senate.*[30]

The district court felt constrained to apply a broad construction to the word "treaty" in section 106 in

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Most civilian jobs on U.S. installations in Europe are held by local nationals or by persons from another European country. These jobs are classified as local national jobs and American dependents cannot fill the jobs because of this classification.

117 CONG. REC. 16,120, 16,132 (1971).

Senator Schweiker commented: "I bet we are the only country in the world that has that unique method of discriminating against [our] enlisted personnel stationed abroad." *Id.*

[30] This view coincides with the interpretations of the General Accounting Office (GAO), *see* Letter from H. L. Krieger, Director of GAO, to Tony Rossi (21 Aug. 1978) (incorporating Letter from H. L. Krieger, Director of GAO, to Secretary of Defense (27 July 1976)), *reprinted in* J.A. at 203, and, until 1977, of the Department of State, *see, e.g.*, Letter from James H. Michel, Deputy Legal Adviser, Department of State, to Earl J. Silbert, United States Attorney (21 Dec. 1978), *reprinted in* J.A. at 212.

Although Congress in 1944 authorized the President to negotiate and conclude agreements "by such means as he finds appropriate," *see* note 8 *supra*, we think that in 1971 Congress withdrew one method as inappropriate—agreements to employ local nationals in preference to United States citizens for civilian positions on overseas military bases—unless such agreements were ratified by two-thirds of the Senate.

part because the interpretation urged by appellants presumably would invalidate the preferential hiring provisions of fourteen international agreements entered into by the President without the advice and consent of the Senate.[31] Because these agreements were entered into "with the understanding that the hiring of local nationals when possible would be part of the *quid pro quo* for the retention by the United States of military bases in the host country,"[32] the court was concerned that abrogation of the preferential hiring provisions would have uncertain repercussions in the conduct of foreign affairs. While we understand the district court's concern, after examining the legislative history we are convinced that Congress was aware of the existence of international agreements providing for preferential hiring of local nationals, and that this was exactly what Congress intended to nullify. We must not overlook the fact that Congress has not been consulted on the agreements.

We might also add that legislation enacted contemporaneously with section 106 supports our conclusion that Congress intended a clear distinction between treaties requiring the ratification of the Senate and other forms of international agreements. In particular, the Case Act makes such a distinction, providing that the executive branch "shall transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agree-

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[31] *See* note 27 *supra*.

[32] *Rossi* v. *Brown*, 467 F. Supp. 960, 968 (D.D.C. 1979).

ment has entered into force with respect to the United States." [33]

The district court declined to read section 106 *in pari materia* with the Case Act on the ground that the statutes did not deal with the same subject matter.[34] Although the general subject matter treated in the two enactments is not the same, Congress used precisely the same word in both, suggesting at least that if Congress had intended a more expansive scope for the exception to the ban on discrimination in section 106, it easily could have chosen the term "international agreement" rather than the word "treaty." Moreover we think a similar concern may have been present in both statutes. As a check on the President's power, Congress, in the Case Act, sought to ensure that the legislative branch received timely notice of all international agreements.[35] By

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[33] Act of 22 Aug. 1972, Pub. L. No. 92-403, § 112b, 86 Stat. 619 (codified at 1 U.S.C. § 112b (1976)). The Department of State relied upon the Case Act in its opinion issued in 1975 that the Base Labor Agreement was *not a treaty* for purposes of section 106. *See* Letter from John A. Boyd, Acting Assistant Legal Adviser for Treaty Affairs, to James E. Masterson, Assistant General Counsel, GAO, at 4 (8 Aug. 1975), *reprinted in* J.A. at 220, 223. Senate Resolution 214 also provides that agreements with Portugal or Bahrain for military bases should be negotiated through treaties submitted to the Senate for ratification rather than through executive agreements. *See* S. REP. No. 632, 92d Cong., 2d Sess. 1 (1972).

[34] *See Rossi* v. *Brown*, 467 F. Supp. 960, 967 (D.D.C. 1979).

[35] An attempt to exert some check on the President's power also prompted the passage of Senate Resolution 214, which required that agreements with Portugal or Bahrain for military bases be negotiated through treaties submitted to the Senate, *see* note 33 *supra*. The Senate Report provides, for

enacting section 106, we think that Congress also wanted to exercise some control over whether United States citizens would be discriminated against in the employment of civilian personnel on overseas military bases. We recognize that the usage in contemporaneous legislation is not dispositive in this case; still, we think it weighs in favor of the view that Congress also intended the term "treaty" in section 106 to mean an agreement made by the President with the advice and consent of two-thirds of the Senate.

## III. Conclusion

In conclusion, we are persuaded that the word "treaty" in section 106 was used in the sense set forth in article II of the Constitution—an international agreement concluded by the President with the advice and consent of two-thirds of the Senate. This construction is consistent with the terminology normally used under United States law. It also comports with congressional intent to alleviate the economic plight of United States military personnel and their dependents; if we were otherwise to construe the term to encompass all international agreements, the exception to the ban on discrimination virtually would engulf the general rule.

Thus we find that the Base Labor Agreement of 27 May 1968 is not a "treaty" for purposes of section 106, and the provision for preferential hiring set forth in article I of the agreement accordingly

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example: "Senate Resolution 214 makes it clear that the character of the agreements [for military bases or foreign assistance to Portugal or Bahrain] and their broad policy implications are too important to be left to unilateral action by the executive branch." S. Rep. No. 632, 92d Cong., 2d Sess. 1 (1972).

is invalidated.[36] We therefore reverse and remand to the district court for further proceedings not inconsistent with this opinion.

*So ordered.*

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[36] Because of this conclusion, we need not address the question of whether the provision for preferential hiring of Filipinos in the Base Labor Agreement violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976).

APPENDIX B

# UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2346

Filed Mar. 20, 1979

ANTHONY ROSSI, ET AL., PLAINTIFFS

*v.*

HAROLD BROWN, Secretary of Defense, ET AL., DEFENDANTS

## MEMORANDUM AND ORDER

This matter comes before the court on cross-motions for summary judgment. The material facts are undisputed. The issue presented is readily stated: whether a Base Labor Agreement ("BLA") entered into between the United States and the Republic of the Philippines which provides for the preferential hiring of local nationals at United States military bases in the Philippines is a "treaty" within the meaning of 5 U.S.C. § 7151 note (1976), which bans discrimination against American citizens at U.S. military bases overseas "[u]nless prohibited by treaty." Restated more generally, the issue is whether the word "treaty" in 5 U.S.C. § 7151 note means a treaty in the constitutional sense—an agreement between nations approved by the Senate under its "advice and consent" powers—or in the broader international sense of any binding agreement between the governments of two nations. The court concludes that the latter interpretation is proper on the facts of this case, and will enter partial summary judgment for the defendants.

## FINDINGS OF FACT

The plaintiffs are citizens of the United States who currently reside in the Philippines. The defendants, Harold Brown and W. Graham Claytor, Jr., are respectively the Secretary of Defense and the Secretary of the Navy. As of March 14, 1978, four of the plaintiffs were employed by the defendants as game room managers at Special Services, U.S. Naval Station Subic Bay, in the Republic of the Philippines. On that date they were notified that the position of game room manager would be converted to a "local national" position which could only be filled by Philippine citizens. This conversion was ordered pursuant to the Base Labor Agreement of 1968, T.I.A.S. No. 6542, Article I, which provides that:

> The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which case United States nationals may be employed.

The Base Labor Agreement has not been approved by the Senate under its "advice and consent" powers set forth in Article II, Section 2, Clause 2 of the United States Constitution. It was, however, negotiated because of an arrangement between the United States and the Republic of the Philippines providing for the establishment and maintenance of U.S. military bases in the Philippines. This negotiation took place pursuant to an Act of Congress passed in 1944, which provides in pertinent part:

> After negotiation with the President of . . . the Philippines, . . . the President of the United States is authorized by such means as he finds appropriate to withhold or to acquire and to retain such bases, necessary appurtenances to such bases, and the rights incident thereto, . . . as he may deem necessary for the mutual protection of the Philippine Islands and of the United States.

22 U.S.C. § 1392 (1976). This statutory authorization led to an initial Military Base Agreement in 1947, T.I.A.S. No. 1775, which has been the subject of periodic renegotiation, and the Base Labor Agreement of May 27, 1968, T.I.A.S. No. 6542.

Upon hearing of their proposed termination, plaintiffs Rossi, Bumgarner, Perry and Frierson instituted administrative proceedings at the Subic Bay Naval Station, contending that their proposed termination constituted unlawful discrimination on the basis of citizenship, actionable under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* (1976). They also maintained that the termination flatly violated Section 106 of Public Law 92-129, 5 U.S.C. § 7151 note (1976) [hereinafter referred to for convenience as "Section 106"] which provides in pertinent part that:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or any installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States . . . .

Local officers at the Subic Bay Station rejected the plaintiffs' complaint because they concluded that neither they nor the Department of the Navy had the authority unilaterally to modify the Base Labor Agreement. The four plaintiffs named above were subsequently fired ahead of schedule pursuant to a Reduction in Force (RIF). This early termination is the subject of a retaliation claim by the plaintiffs, which is not before the court in the present motions. The defendants correctly note that all of the plaintiffs' proposed findings of fact which relate to that termination and the retaliation claim are immaterial in the present posture of the case.

After notice of their proposed early termination, the plaintiffs brought this action on December 13, 1978, seeking a Temporary Restraining Order enjoining the defendants from firing them and barring them from the base. The court granted a temporary restraining order to permit adequate consideration of the matter, and then denied plaintiffs' Motion for a Preliminary Injunction on December 22, 1978. The court subsequently ordered cross-motions for summary judgment on the legality of Article I of the Base Labor Agreement and its status within the meaning of Section 106.

## CONCLUSIONS OF LAW

### I. *The Parties' contentions*

The plaintiffs' position is that Congress used the term "treaty" in Section 106 with full knowledge of its meaning and the intention that it be construed in its constitutional sense. They ask the court to examine the plain meaning of the term, recognizing that although no distinction is drawn between

"treaty" and "executive agreement" for purposes of international law, a clear distinction does exist under United States law, which the Congress must be presumed to have employed. This position, they argue, is supported by the legislative history of Section 106, by the legislative history of contemporaneous legislation which employed the term "treaty", and by interpretations of the General Accounting Office, and, until 1977, of the Department of State. The plaintiffs also contend that Congress, by enacting various laws which prohibit discrimination, has expressed its intent to prevent discrimination against American citizens at overseas military bases. Finally, plaintiffs argue that the Supremacy clause prevents the BLA from overriding conflicting Congressional enactments unless the BLA is a treaty in the constitutional sense.

The defendants maintain that although the Base Labor Agreement was never submitted to the Senate for "advice and consent" and is not a treaty in the narrow constitutional sense, it is a valid and binding international obligation of the United States, entered into pursuant to congressional authority, and thus is a "treaty" within the meaning of Section 106. They reason that the Base Labor Agreement falls within the definition of "treaty" under international law, and that other courts, particularly the Supreme Court in *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912), have held agreements between the United States and another nation to be "treaties" within the meaning of certain statutes, even without the Senate's advice and consent. According to the defendants, the legislative history of Section 106 is so sparse, and the wording so awkward, that it would be a serious mistake to conclude that Congress intended to upset numerous international agreements

by a statute so hastily passed. They point to the total absence of any indication of intent to upset existing international agreements, even though numerous agreements similar to the BLA were in force between the United States and other nations at the time Section 106 was passed. Finally, the defendants stress the need for the court to employ sound principles of judicial deference when interpreting the term "treaty" in order to avoid upsetting existing relations with foreign nations and to refrain from interfering with the executive branch's conduct of foreign affairs. After an examination of the pertinent statutes involved here, and the legislative history of Section 106, the court is convinced that the defendants' position, particularly in view of the absence of a showing of persuasive legislative history, is correct.

II. *"Treaty"—Generic and Constitutional Meanings*

The broad meaning of the word "treaty", as the term is customarily used, is:

> any international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular description . . . .

Vienna Convention of the Law of Treaties of May 23, 1969, Art. 2(1)(a), *compiled at* 63 Am. J. Int'l L. 875 (1969). *See also B. Altman & Co.* v. *United States*, 224 U.S. 583, 600-01 (1912); L. Henkin, *Foreign Affairs and the Constitution* 142 (1972). Thus, the term implies a binding agreement between nations which governs some aspect of the relations between them. The parties do not dispute that the

Base Labor Agreement falls within this definition of treaty, because it was entered into in 1968 by the United States and the Republic of the Philippines after joint negotiation and drafting.

The United States Constitution suggests a narrower definition of the term "treaty".[1] Article II, Section 2, Clause 2, in delineating the powers of the President, states that:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .

Although this clause might suggest that the President cannot enter into agreements with other nations without the advice and consent of the Senate, the actual evolution of the relationship between the Executive and Legislative branches, together with a recognition of the President's powers in managing the foreign relations of the United States, have led to a recognition of the use of agreements between governments without the advice or consent of the Senate. *See generally* L. Henkin, *supra*, at 173-88.[2] It is presently beyond dispute that the President may enter into such agreements, known as executive agreements, and that such agreements are binding

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[1] "The Constitution does not define 'Treaties': the Framers, apparently, saw no need to define what was well known to international law and practice." L. Henkin, *supra*, at 140.

[2] Henkin notes that:

> The Constitution does not expressly confer authority to make international agreements other than treaties, but executive agreements, varying widely in formality and importance, have been common from our early history.

L. Henkin, *supra* at 173 (1972).

upon the United States. *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). An executive agreement, it is understood, is a "treaty" within the broad generic sense set forth above, but is not a "treaty" in the sense set forth in the Constitution.

The Base Labor Agreement is not, strictly speaking, an "executive agreement." It is what one commentator has labelled a "Congressional-Executive Agreement," L. Henkin, *supra*, at 173, because Congress "authorized the President in advance to negotiate and conclude agreements on [a] particular subject[]." *Id.*; *see* 22 U.S.C. § 1392 (1976) (President authorized to acquire and maintain bases in Philippines "by such means as he finds appropriate"). Henkin notes that the constitutional basis of such agreements is unclear, but goes on to state:

> Neither Congresses nor Presidents nor courts have been troubled by these conceptual difficulties and differences. Whatever their theoretical merits, it is now widely accepted that the Congressional-Executive agreement is a complete alternative to a treaty: the President can seek approval of any agreement by joint resolution of both houses of Congress instead of two-thirds of the Senate only. Like a treaty, such an agreement is the law of the land, superseding inconsistent state laws as well as inconsistent provisions in earlier treaties, in other international agreements or acts of Congress.

L. Henkin, *supra*, at 175 (footnotes omitted). *Compare id.* at 176-84 (discussion of "sole" executive agreements). Of course, it still can be maintained that Congress withdrew in 1972 a portion of that

broad power which it granted to the President in the Act of 1944. Here again the question turns on the intent of Congress as gauged by an examination of the legislative history. *See* Restatement (Second) Foreign Relations Law of the United States § 145 (1965).[3]

It is in this context that the court must determine whether Section 106, which prevents discrimination against American citizens "unless prohibited by treaty" controls over and invalidates Article I of the Base Labor Agreement of 1968. If Congress intended the word "treaty" to encompass only treaties entered into with the advice and consent of the

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[3] The Restatement (Second) contains the following provision:

> § 145. Effect of Subsequent Act of Congress on International Agreement
>
> (1) An act of Congress enacted after an international agreement of the United States becomes effective, that is inconsistent with the agreement, supersedes it as domestic law of the United States, *if the purpose of Congress to supersede the agreement is clearly expressed.*
> (2) The superseding of the agreement as domestic law of the United States by subsequent act of Congress *does not affect the international obligation of the United States under the agreement.*

(emphasis added). Comment (b) to Section 145 states:

> [t]he courts do not favor repudiation of an earlier international agreement by implication and require clear indications that Congress, in enacting subsequent inconsistent legislation, meant to supersede the earlier agreement.

The court recognizes that the BLA has no domestic effect, so that part (1) of Section 145 is not directly applicable. The approach, however, is directly on point: the purpose of Congress must be explored to overcome a reluctance to overturn international agreements by implication.

Senate, Section 106 would control over the BLA. If Congress intended the broader term to apply, then the Base Labor Agreement provision for preferential hiring of foreign nationals is controlling.

III. *Plain Meaning and Legislative History*

The court turns, as it must, first to the words of the statute themselves and any indications of Congressional intent reflected in the legislative history of Section 106.

The plaintiffs contend that the mere use of the word "treaty" in Section 106 disposes of the matter, because the term "treaty" "is normally used to indicate an international agreement that is to be or has been brought into force with respect to the United States by and with the advice and consent of the Senate in conformity with Article II of the Constitution." Plaintiffs' Exhibit R (1975 letter of James Boyd, Acting Ass't Legal Advisor to State Department). This contention is plausible, but several factors argue against it. First, even the sources cited by the plaintiffs state that the term treaty "normally" or "most frequently" is used to refer to a treaty produced with the advice and consent of the Senate. They do not state that it invariably carries such a meaning. Second, several courts have held that executive agreements were "treaties" within the meaning of an Act of Congress. In *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912), the Supreme Court held that an executive agreement between the United States and France was a "treaty" within the meaning of the Circuit Court of Appeals Act, so that a direct appeal could be had to the Supreme Court. The Court noted that the agreement was an international compact between two sovereign nations, and that

> If not technically a treaty requiring ratification, nevertheless it [the agreement] was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, . . . .

224 U.S. at 601. More recently, the United States Court of Appeals for the Eighth Circuit held that the Philippine Military Bases Agreement, which was drafted pursuant to the same statutory authority as the BLA, was a treaty within the meaning of a Supreme Court decision providing that the extradition of a defendant in a criminal case could only be valid if authorized "by treaty or Act of Congress." *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); *see Valentine* v. *United States*, 299 U.S. 5 (1936). Thus, the mere use of the word "treaty" is not dispositive.

This conclusion is buttressed by an examination of the context in which the word "treaty" appears. Section 106 provides that "[u]nless *prohibited* by treaty, no person shall be discriminated against . . . ." The defendants point out quite correctly that the term "prohibited" in this context is awkward, at best. It would have been more appropriate to state that "unless provided by treaty", or "unless permitted by treaty", no discrimination could occur. Whether the use of "prohibited" is an indication of sloppy draftsmanship or a more subtle intention of Congress cannot be ascertained at this point. The court does consider this confusing language significant, however, in evaluating the plaintiffs' contention that Congress chose its words carefully and meant just what it said when it used the word "treaty".

Nor does the legislative history of Section 106 support the plaintiffs' position. As the defendants correctly note, Section 106 was part of Public Law 92-129, an act which dealt extensively with military pay, the selective service, and authorization of active duty strengths for fiscal year 1972. Congress devoted extensive discussion to these topics, while paying almost no attention to what became Section 106. *See* H. Rep. No. 433, 92d Cong., 1st Sess. (1971); S. Rep. No. 93, 92d Cong., 1st Sess. (1971). The parties have not directed the court to any discussion of the import of the term "treaty", and the court has not located any on its own. Indeed, the only significant discussion of the provision indicates that Congress was more concerned with discrimination on bases in Europe which had been occurring in the absence of a Base Labor Agreement:

> The purpose of the Senate provision is to correct a situation which exists at some foreign bases, primarily in Europe, where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardship for families of American enlisted men whose dependents are effectively prevented from obtaining employment.

H. R. Rep. No. 433, *supra*, at 31 (Conference Committee Report). *See* S. Rep. No. 93, *supra*, at 23 (similar statement). Other references to proposed section 106 merely state that it would "[p]rohibit discrimination against American citizens and their dependents in employment on overseas military bases." *Id.* at 2, 6, 41. At the time Public Law 92-129 was passed, the NATO Status of Forces Agreement contained no provision for hiring local nationals

over American citizens. Defendants' Cross Motion for Partial Summary Judgment at 11. The debates on the floor reflect a concern with matters other than discrimination pursuant to Base Labor Agreements. *E.g.*, 117 Cong. Rec. 13919 (quote similar to provision in Conference Report); 16126 (remarks of Sen. Cook) (wives of enlisted men unable to secure work permits although many foreign nationals are hired); 16128 (remarks of Sen. Schweiker) (expressing concern over command decisions to hire local nationals in Germany although not required to do so).[4]

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[4] In their supplemental memorandum, the plaintiffs maintain that "abundant" evidence indicates that Congress explicitly intended to abrogate Executive Agreements which promoted discrimination against United States citizens on overseas bases. A review of the passages from the floor debate indicates a paucity, rather than an abundance, of evidence to support the plaintiffs' position. The Senate floor debates of May 11 and May 20, 1971 contain perhaps the most significant discussions of the antidiscrimination amendment. On May 11, 1971 Sen. Schweiker began his discussion of the issue by referring to a letter drafted by Brig. Gen. Charles Phipps, which discusses the employment of U.S. tourists and dependents. The letter encourages Exchange System employers to hire local nationals, because of their lower wage costs and turnover rate. 117 Cong. Rec. 14394-95 (May 11, 1971). Senator Schweiker returned to the subject several minutes later, discussing discrimination against servicemen, but focusing on the Phipps letter. He did not mention an "agreement" for local national preference. *Id.* at 14397.

The plaintiffs nonetheless contend that the Senate, upon returning to the subject of Section 106 on May 20, 1971, explicitly discussed the BLA. *See* Plaintiffs' Supplemental Memorandum, at 3. These comments appear to refer to the plight of young wives of lower ranking servicemen who could not accompany their husbands to Europe except by coming on a tourist visa. The remarks of Senators Cook and Hughes

Thus, the court concludes that neither the plain language of Section 106 nor the legislative history of the Act supports the plaintiffs' contention that Con-

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reveal nothing about Base Labor Agreements or the meaning of "treaty" in Section 106. The excerpts cited by the plaintiffs are revealing:

> . . . it was my understanding that there was an *agreement*, through the NATO organization, *that these young wives, because they were there on tourist visas, could not get a work permit under any circumstances.*

117 Cong. Rec. 16126 (May 20, 1971) (remarks of Sen. Hughes) (emphasis added).

The next passage cited by the plaintiffs reads as follows:

> Another major point is that there should be a renegotiation of the Status of Forces Agreement (SOFA)
>
> Portions of SOFA could and should be changed to allow dependent wives to take many of the jobs now available solely to local nationals, he maintains.

*Id.* at 16128 (read into the record by Sen. Schweiker, quoting from an article which appeared in *Stars and Stripes*). The very next passage, which the plaintiffs neglected to quote, goes on to say:

> Mr. President, let me interject there that we have done some research and find that in Germany particularly, that is not the case. Our commanding general who is head of the European Exchange System, Gen. Charles H. Phipps, in a memo of February 1971, issued this edict across Europe to all the stores and services in the exchange system:
>
> [quoting Phipps letter] For the reasons outlined above, I desire that the European Exchange System elements in the months ahead emphasize recruitment of local nationals and sharply deemphasize the utilization of United States dependents or tourists.
>
> [by Sen. Schweiker] Here is an American general saying that when the GI's go to their canteen or service post exchange and spend their money, they do not even

gress intended to ban all discrimination on military bases abroad, even when pursuant to an agreement between nations. In fact, the legislative history would argue against such an interpretation.

The plaintiffs nonetheless argue that the "legislative context" of Public Law 92-129 supports their position, because other laws enacted by Congress during the same time period make a clear distinction between "treaty" in the narrow constitutional sense and the broader definition. Thus, the 92d Congress also enacted the Case Act, 1 U.S.C. § 112b, which requires the executive to transmit to Congress" the text of any international agreement, *other than a treaty*, to which the United States is a party. . . ." *See also* S. Rep. No. 632, 92d Cong., 2d Sess. (1972) (Committee Report for S. Res. 214, stating that agreements with Portugal or Bahrain for military bases should be submitted as treaty for advice and consent, rather than as executive agreement). These enactments do reflect a concern in Congress that the President was conducting foreign policy without adequately consulting the Senate. They do not, however,

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have the right to have their wives working there because we should give those jobs to local nationals.

117 Cong. Rec. 16128 (May 20, 1971) (emphasis added)

The remaining comments cited by the plaintiffs are mere precatory language about discrimination.

Finally, the defendants correctly state that Mr. Schweiker, in continuing his discussion, reviewed the plight of lower level servicemen in Europe and stated that "[j]ust a simple Executive order would change this." 117 Cong. Rec. 16132 (May 20, 1971).

Thus, contrary to the plaintiffs' assertions, the legislative history of Section 106 is far from clear, and it can in fact be credibly argued that Congress had in mind only those instances of discrimination which resulted from the caprice of individual officers.

support the plaintiffs' contention that Section 106 of Public Law 92-129 must be read *in pari materia* with contemporaneous legislation.

First, the cases relied upon by the plaintiff involved closer similarities in language than the use of a single word. *See, e.g., United States* v. *Stewart*, 311 U.S. 60, 64 (1940) (two acts passed at different times dealt "with precisely the same subject matter . . . the scope of the tax exemption afforded farm loan bonds"). In *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-44 (1972), the Supreme Court stated that

> The rule of *in pari materia*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a 'later act can . . . be regarded as a legislative interpretation of [an] earlier act. . . .' "

The present case deals with two statutes which do not deal with the same subject matter. Both the Case Act and the debate over Senate Resolution 214, it is true, dealt with Congressional concern over the Executive Branch's increasing use of executive agreements rather than submitting international agreements to the Senate. Section 106, however, insofar as the court can determine from the legislative history, dealt with discrimination against the families of American servicemen, particularly in Europe. If the Congress was attempting to make Section 106 another front in the war against executive agreements, as plaintiffs suggest, there should have been at least *some* indication of that intent in the legislative history. The court therefore rejects the plain-

tiffs' suggestion that the word "treaty" be interpreted in the constitutional sense just because it was so employed in roughly contemporaneous legislation.

IV. *Judicial Deference in the Area of Foreign Affairs*

The court notes that at the time Section 106 was passed, twelve international agreements were in effect which contained provisions for hiring preference for local nationals at overseas military bases. None of these agreements had been submitted for the advice and consent of the Senate. Defendants' Cross-Motion for Partial Summary Judgment at 12 n. 11. Two additional agreements have been added since 1971 with local national preference provisions. It is beyond dispute that these agreements were entered into after negotiations, with the understanding that the hiring of local nationals when possible would be part of the *quid pro quo* for the retention by the United States of military bases in the host country. The interpretation of Section 106 urged by the plaintiffs would invalidate the preferential hiring provisions of these treaties, with uncertain effects in the conduct of foreign affairs.[6] The existence of these agreements, and their scope, counsels the court in two

[6] It is true that the only BLA actually before the court concerns the Republic of the Philippines, and that the court can make no factual findings regarding the extent of local national hiring or foreign policy implications of similar agreements with other nations. Nonetheless, if the court affirmed the plaintiffs' position and was upheld on appeal, the court's construction of Section 106 would perforce have an impact on other agreements. Counsel for the plaintiffs acknowledged this impact at the hearing in this matter, agreeing that a decision by this court would constitute "persuasive" authority for similar challenges.

ways. First, it suggests that the court should not lightly infer a Congressional intent to overturn portions of fourteen international agreements in the absence of *any* legislative history suggesting such an intent. Second, it persuades the court to act cautiously in an area fraught with sensitivity and affecting foreign affairs of the United States.

The court does not agree with the suggestion put forth by the defendants, however, that this controversy is nonjusticiable. Defendants' Cross-Motion for Summary Judgment at 13-14, *citing Diggs* v. *Richardson*, 555 F.2d 848 (D.C. Cir. 1976); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). This case does not require the court to interpret the terms of a treaty or to meddle in areas of foreign import which have been traditionally regarded as the province of the President. It involves the construction of an Act of Congress, a task which necessitates an evaluation of the wording of the statute, the legislative history, and the applicable case law and canons of construction. The impact on foreign affairs of such construction does not render the case nonjusticiable. It does, however, persuade the court that the construction urged by the plaintiffs would have to be supported by a far firmer basis than that existing here.

V. *Applicability of Title VII to this Action*

The court concludes that the term "treaty" in Section 106 should be construed to mean a treaty as the term is defined under international law—an agreement between nations. This being the case, the Base Labor Agreement is a valid exercise of the President's authority to retain bases "by such means as he finds appropriate." 22 U.S.C. § 1392 (1976). The

specific provision that the Department of Defense may discriminate on the basis of citizenship if provided by treaty therefore controls over the general provisions of Title VII. *Randzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976); *Morton* v. *Mancari*, 417 U.S. 535 (1974). The court need not address the question whether Title VII applies to citizenship as well as to national origin.

The court's holding regarding Title VII does not, however, apply to those portions of the plaintiffs' case based upon allegations of retaliation. The retaliation issues are not before the court at this time, and no statute provides that retaliation may be engaged in. It appears to the court, however, that the reprisal charges might not be ripe for review. The reprisal complaint challenging the plaintiffs' early termination was filed on November 15, 1978. The court is entirely willing to adjudicate this issue, but it must be satisfied that the strict "jurisdictional prerequisites", which give the court subject matter jurisdiction, have been met. *See* 42 U.S.C. § 2000e-16(c) (1976) (civil action may be filed after 180 days have expired without agency action on administrative complaint); *Richardson* v. *Wiley*, 569 F.2d 140, 142 (D.C. Cir. 1977) (Title VII time limitations are jurisdictional). Therefore, the court will order the parties to appear at a status call ten days from the date of this order to clarify the status of plaintiffs' retaliation claim.

## CONCLUSION

The court holds that on the facts of this case, the term "treaty" in Section 106 of Public Law 92-129, 5 U.S.C. § 7151 note (1976), means any agreement between nations. The court also holds that Title VII

of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* is therefore inapplicable to this action. Partial summary judgment on these issues will be entered for the defendants. The plaintiffs' remaining discovery motions, having been rendered nugatory by the above holdings, will be denied.

/s/ Thomas A. Flannery
United States District Judge

Dated: 3-20-79

# UNITED STATES DISTRICT COURT
# FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2346

ANTHONY ROSSI, ET AL., PLAINTIFFS

*v.*

HAROLD BROWN, Secretary of Defense, ET AL., DEFENDANTS

Filed Mar. 20, 1979

## ORDER

This matter came before the court on cross-motions for partial summary judgment. Upon consideration of the motions, the record in this case, the hearing held before the court, and the applicable law, it is, by the court, in accordance with the foregoing Memorandum, this 20th day of March, 1979,

ORDERED that the plaintiffs' motion for partial summary judgment shall be, and the same hereby is, denied; and it is further

ORDERED that the defendants' motion for partial summary judgment shall be, and the same hereby is, granted; and it is further

ORDERED that plaintiffs' motions for the issuance of letters rogatory and to compel the depositions of certain Department of State officials shall be, and the same hereby are, denied; and it is further

ORDERED that the parties appear before the court for a status call on April 3, 1979 at 9:30 a.m. to apprise the court of the present status of the plaintiffs' retaliation claim and to determine what further action should be taken in this case.

/s/ Thomas A. Flannery
United States District Judge

[SEAL]

APPENDIX C

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
Washington, D.C. 20350

26 May 1978

From: Director of Equal Employment Opportunity

To: Mr. Anthony M. Rossi, Recreation Aid, PSO139-2, Special Services Department, U.S. Naval Station, Subic Bay

Subj: Notice of decision to reject class complaint of discrimination

Ref: (a) FEAA ltr of 4 May 78, subj: Class Complaint/Mr. Anthony Rossi

(b) FPM Supplement 990-1, Part 713

1. Your class complaint of discrimination based on national origin, including the findings and recommendations of the Complaints Examiner (reference (a)) has been carefully reviewed in accordance with the provisions of reference (b). Reference (b) provides that the Complaints Examiner's recommendation to accept, reject, or modify a complaint shall become the agency decision unless the agency rejects or modifies the decision within 10 calendar days of its rejection. In this regard, it should be noted that although the Complaints Examiner's recommendation to the agency, reference (a) is dated 4 May 1978 it was received by this office on 16 May 1978.

2. In accordance with references (a) and (b), the Department of the Navy accepts the recommendation of the Complaints Examiner that your class complaint be rejected. Your class complaint is hereby rejected

for the reasons recommended by the Complaints Examiner (listed in the subparagraphs below) and for the additional reasons listed in paragraphs 3 and 4 of this letter. Specifically, the Department concurs with the Complaints Examiner in the following:

a. *Timeliness.* The complainant did not actually suffer an individual injury within the 90 day period prior to 29 March 1978. Therefore the complaint does not meet the criteria for acceptance set forth in 5 CFR 713.602(a) (reference (b)).

b. *Class.* The complainant's class based on common citizenship does not meet the definition of a class set forth in 5 CFR 713.601(a) (reference (b)) for the reasons stated in the Complaints Examiner's reasons set forth in reference (a).

c. *Claims of the Agent and Class.* The complaint fails to demonstrate any typicality in the claims of those members of the ostensible class, who wish to be employed, with the claims of yourself, the agent, an employee of the Navy. Therefore, the complaint does not meet the criteria set forth in 5 CFR 713.601(b)(iii) (reference (b))for a class complaint.

3. In addition to the foregoing, 5 CFR 713.601(a) provides that a class may be established only if a complaint of discrimination alleged that the class members:

> have been, are being, or may be adversely affected, by an agency personnel management policy or practice which the agency has authority to rescind or modify . . . .

The alleged discriminatory practice of giving preferential treatment in employment to Filipino citizens over United States nationals is required by Article I, paragraph 1, of the Base Labor Agreement of 27

May 1968 (BLA) between the Governments of the United States and the Republic of the Philippines. The BLA is a legally binding obligation of the United States Government which can not be unilaterally modified. Article VI, paragraph 3, of the BLA specifically provides that:

> Either Government may at any time request the revision of any provision of this Agreement, in which case the two Governments shall enter into negotiations through diplomatic channels.

Thus, it is clear that the Government of the Philippines would have to agree to a revision of Article I, paragraph 1, of the BLA. Accordingly, it is concluded that the matters complained of in the instant class complaint are not under the control of the Department of the Navy and the Department does not possess the authority to rescind or modify the alleged discriminatory practices complained of in the complaint. Therefore, a class may not be maintained in this matter under 5 CFR 713.601(a).

4. Finally, the complaint here in issue is based, at least in part, on allegations the employment practices of the Department of the Navy violated section 106 of Public Law 92-129 (the Act of September 28, 1971, 85 Stat. 348, 355). Inasmuch as the class complaint regulations of the Civil Service Commission provide only for redress of alleged violations of the Civil Rights Action of 1964, as amended, those portions of the class complaint based upon alleged violations of section 106 of Public Law 92-129 are found to be not within the purview of the class complaint regulations and are rejected.

5. This is the final decision of the Department of the Navy on this matter. If you are dissatisfied

with the decision, you have the following appeal rights.

a. An Agent may appeal to the Appeals Review Board (ARB) the decision of the Head of the Agency or his/her designee to reject or cancel his/her complaint, or a portion thereof, for reasons covered by 5 CFR 713.604. An appeal may be filed at any time after receipt of the Agency's final decision, but not later than 15 calendar days after receipt of that decision except when the appellant shows that he/she or his/her representative was not notified of the prescribed time limit and was not otherwise aware of it, or that he/she or his/her representative was prevented by circumstances beyond his/her control from appealing within the prescribed time limit. An appeal shall be deemed filed on the date it is postmarked, or in the absence of a postmark, on the date it is received by the ARB. An appeal to the ARB should be addressed to the U. S. Civil Service Commission Appeals Review Board, 1900 E Street, N.W., Washington, D. C. 20415.

b. The Agent has the right to proceed with his/her individual complaint of discrimination, and to appeal the final agency decision on the matter to the Appeals Review Board (ARB) and to file a civil action.

c. An Agent who has filed a discrimination complaint based on race, color, religion, sex and/or national origin is authorized to file a civil action in an appropriate U.S. District Court, (1) within 30 calendar days of his/her receipt of notice of final action taken by his/her agency on a complaint; (2) after 180 calendar days from the date he/she filed a complaint with his/her agency if there has been no decision on the complaint; (3) within 30 calendar days

of his/her receipt of the decision of the ARB on his/her appeal; or (4) after 180 calendar days from the date he/she filed an appeal with the ARB, if there has been no ARB decision.

/s/ W. M. Paz
W. M. PAZ

Copy to:

OGC (09A)
JAG (104)
OCP (113)
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APPENDIX D

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 79-1485

September Term, 1979

Civil No. 78-2346

ANTHONY M. ROSSI, ET AL., APPELLANTS

*v.*

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: McGOWAN and WILKEY, Circuit Judges, and DAVIES*, Senior United States District Judge for the District of North Dakota

## JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

the case is remanded for further proceedings, not inconsistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 15, 1980

*Opinion for* the Court filed by Circuit Judge Wilkey

APPENDIX E

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 79-1485

September Term, 1980

Civil Action 78-2346

ANTHONY M. ROSSI, ET AL., APPELLANTS

*v.*

HAROLD BROWN, AS SECRETARY OF DEFENSE, ET AL.

Before: McGowan and Wilkey, Circuit Judges; Davies*, U.S. Senior District Judge for North Dakota

## ORDER

On consideration of appellees' petition for rehearing, it is

ORDERED, by the Court, that appellees' aforesaid petition is denied.

*Per Curiam*
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Filed Dec. 18, 1980

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* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

APPENDIX F

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1485

September Term, 1980
Civil Action 78-2346

ANTHONY ROSSI, ET AL., APPELLANTS

*v.*

HAROLD BROWN, as Secretary of Defense, ET AL.

Before: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges and Davies *, U.S. Senior District Judge for North Dakota

## ORDER

The suggestion for rehearing *en banc* filed by appellees having been transmitted to the full Court and no judge in regular active service, and no member of the panel which considered this case, having requested a vote with respect thereto, it is

ORDERED, by the Court *en banc*, that appellees' aforesaid suggestion for rehearing *en banc* is denied.

*Per Curiam*
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Filed Dec. 18, 1980

* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

## APPENDIX G

# PHILIPPINES

## Military Bases in the Philippines: Employment of Philippine Nationals

*Agreement signed at Manila May 27, 1968;*
*Entered into force May 27, 1968.*
*With agreed minutes.*

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## AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES RELATING TO THE EMPLOYMENT OF PHILIPPINE NATIONALS IN THE UNITED STATES MILITARY BASES IN THE PHILIPPINES

The Government of the United States of America and the Government of the Republic of the Philippines:

Having agreed in the Military Bases Agreement of 1947,[1] as amended, to establish United States military bases in the Philippines to serve the common defense of the two countries;

Noting the absence in that Agreement of provisions concerning labor relations and terms and conditions of employment of Filipino citizens employed by United States Armed Forces in the Philippines;

Recognizing the need to promote and maintain sound employment practices which will assure equal-

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[1] TIAS 1775, 6084; 61 Stat. (pt. 4) 4019; 17 UST 1212.

ity of treatment of all employees and their right to self-organization and collective bargaining; the orderly administration and effective operation of the bases; and continuing favorable employer-employee relations thereon; and

Believing that an agreement will be mutually beneficial and will strengthen the democratic institutions cherished by both Governments;

Have agreed as follows:

## ARTICLE I

### EMPLOYMENT STANDARDS

1. *Preferential Employment.*—The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed. Exception is permitted, however, in the case of third country nationals already employed on the date of entry into force of this Agreement and in the case of technical personnel of third country nationality as envisaged in paragraphs 1 and 2, Article XI of the Military Bases Agreement of 1947, as amended.

2. *Uniform Standards.*—To the extent consistent with the provisions of this Agreement and the national laws of either country and regulations pursuant thereto and in conformity therewith, terms and standards of employment, including wages, working conditions and benefits shall be subject to collective bargaining and, under uniform personnel policies and

administration, shall apply equally to all employees, regardless of nationality and sources of funds used.

3. *Overtime Compensation.*—Work performed in excess of the regular workday and workweek shall be considered overtime to be paid the corresponding overtime compensation.

4. *Manpower Allocation.*—In the event the Philippine Government adopts measures allocating manpower, the two Governments shall work out in the Joint Committee established under Article III measures ensuring fulfilling of the labor needs of the United States Armed Forces.

5. *Social Security Benefits.*—The United States Armed Forces in the bases shall implement, as of July 1, 1968, a health insurance program and shall consider the adoption of additional social security benefits to Filipino employees consistent with prevailing industry practices in the Philippines.

6. *Security of Employment.*—Consistent with their military requirements, the United States Armed Forces shall endeavor to provide security of employment and, in the event certain activities or services are contracted out, the United States Armed Forces shall require the contractor or concessionaire to give priority consideration to affected employees for employment. The United States Armed Forces shall at the same time give to such employees priority consideration for reemployment by the base. If reemployed by the base, such employment shall be without loss of seniority.

7. *Severance Pay.*—Except when separation is for cause, severance pay benefits shall be granted to those employees whose employment is terminated involuntarily, including termination by reduction in force caused by disestablishment or deactivation of a func-

tion, activity or command. For purposes of computing severance pay, the basis shall be the employee's total or aggregate service, less periods of service for which he had already been paid severance pay.

## ARTICLE II

### RIGHT TO SELF-ORGANIZATION AND COLLECTIVE BARGAINING

1. Filipino employees of the United States Armed Forces in the Philippines shall have the right to self-organization and to collective bargaining in accordance with the provisions of this Agreement. The right to self-organization shall include the right to join or refrain from joining a union or labor organization without interference, coercion, restraint, discrimination or reprisal.

2. Any federated labor organization or individual labor organization duly registered in accordance with Philippine laws and representing the majority of the Philippine employees of the United States military bases in the Philippines shall be entitled to recognition by the United States Armed Forces and shall enjoy exclusive bargaining representation for such employees. The United States Armed Forces will make provision for voluntary checkoff of labor organization dues. In the event a labor organization does not represent a majority of such employees, any duly registered labor organization representing a majority of the employees at a base or group of bases shall be entitled to recognition and enjoy exclusive bargaining representation for such base or group of bases. Nevertheless, any employee shall have the right to present a grievance directly or through a representative under established grievance or labor relations proce-

dures. Questions concerning recognition may be referred to the Joint Committee provided for in Article III of this Agreement.

3. In view of the common security interests of the two Governments as recognized in the Military Bases Agreement of 1947, as amended, the Joint Committee described in Article III, below, at the request of either party to a dispute which threatens the orderly and effective operation of the bases, shall direct measures to promote resolution of that dispute. Any action taken by a recognized labor organization which interrupts or disrupts the orderly and effective operation of the bases before the Joint Committee has taken its final action in such a case may be considered just cause for withdrawal or recognition of that organization. Disciplinary action may be taken against any individual employee or group of employees participating in such action, subject to review, however, by the Joint Committee, which shall proceed in accordance with Article III hereof.

4. The Joint Committee shall not be deemed to have taken final action until the dispute has been resolved between the parties under the procedures provided in Article III of this Agreement. During this period, the parties to the dispute shall observe utmost good faith in collective bargaining and in negotiating their differences without resorting to acts inimical to their mutual interests.

## ARTICLE III

### JOINT COMMITTEE

1. Any dispute between the United States Armed Forces and Filipino employees or duly recognized union or organization of employees which cannot be

settled through grievance or labor relations procedures provided for in Article II of this Agreement may be referred by either party to the dispute to a Joint Committee which shall be composed of not more than three representatives appointed by each Government and shall include labor relations specialists.

2. The Committee shall determine its own procedures and, whenever a dispute has been referred to it, shall:

(a) Devise means by which the parties themselves can settle their dispute rather than render final decisions; and

(b) Satisfy itself that every effort has been fully exerted by the parties to settle the dispute through the grievance or labor relations procedures referred to above. Otherwise, it may refer the dispute back to the parties, indicating what further steps may be taken to reach a settlement.

3. In the event the dispute remains unresolved, and either party resubmits it to the Joint Committee, the latter may refer the matter back to the parties requiring either mediation, conciliation or fact-finding or recommending any other measure.

4. The Governments of the United States and of the Philippines, through their respective authorized agencies or representatives shall, upon request, make available to the Joint Committee or any mediator, conciliator or fact-finder indicated in the preceding paragraph, all pertinent materials, data or information, except those which are classified for security reasons.

5. The Joint Committee, referred to above, shall likewise serve as a channel for continuing consulta-

tion betwen the two Governments and as the principal channel for the implementation of this Agreement.

## ARTICLE IV

### GENERAL PROVISIONS

1. Contractors and concessionaires performing work for the United States Armed Forces in the Philippines shall be required by their contracts or concessions agreements to comply with all applicable Philippine labor laws and regulations. For the effective enforcement of these labor laws and regulations, base authorities shall facilitate access by appropriate Philippine government officials to sites where such contractors work, upon prior request and proper identification.

2. Nothing in this Agreement shall imply any waiver by either of the two Governments of its immunities under international law.

## ARTICLE V

### MID-YEAR ANNUAL BONUS

In view of the concerns of both Governments for the general welfare of the employees of the United States Armed Forces in the Philippines and in response to a request from the Philippine Government, the United States Armed Forces will, as an incentive to such employees, pay each Philippine national employed by them for one year or more on July 1, 1968, a mid-year bonus of two hundred pesos and to those employed on July 1 of each subsequent year the same amount. Those employed for less than one year on the date of payment will be paid a pro-rata

share of two hundred pesos for each full month of employment.

## ARTICLE VI

### ENTRY INTO FORCE

1. This Agreement shall enter into force upon signature by the two Governments except with respect to any provision which requires further administrative action for its execution. Any such provision shall enter into force as soon as the requisite administrative action has been taken but in no case later than six months from the date of signature by the two Governments.

2. Employment policies, practices and benefits existing at the time this Agreement enters into force shall continue unless modified by collective bargaining in accordance with this Agreement or by subsequent agreement between the two Governments.

3. Either Government may at any time request the revision of any provision of this Agreement, in which case the two Governments shall enter into negotiations through diplomatic channels.

4. This Agreement, and agreed revisions thereof, shall remain in force for the duration of the Military Bases Agreement of 1947, as amended, unless terminated earlier by agreement between the two Governments.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement, incorporating the attached Agreed Minutes.

DONE at Manila, in duplicate, this 27th day of May, 1968.

For the Government of the United States of America:

/s/ James M. Wilson Jr.
JAMES M. WILSON JR.
Charge d'Affairs, Mi.

Members of the United States Panel

/s/ Hugh G. Appling
HUGH G. APPLING
Chairman

/s/ William Paz
WILLIAM PAZ

/s/ Robert M. Fisk
ROBERT M. FISK

For the Government of the Republic of the Philippines:

/s/ Blas F. Ople
BLAS F. OPLE
Secretary of Labor

Members of the Philippine Panel

/s/ R. M. Inocentes
R. M. INOCENTES
Chairman

/s/ Gauttier F. Bisnar
GAUTTIER F. BISNAR
Vice Chairman

/s/ Ruben F. Santos
RUBEN F. SANTOS

/s/ Apolonio V. Castillo
APOLONIO V. CASTILLO

/s/ Paciano C. Villavieja
PACIANO C. VILLAVIEJA

/s/ F. A. Fuentes
F. A. FUENTES

/s/ Cristela A. Feria
CRISTELA A. FERIA

/s/ S. Tomas de la Cruz
S. TOMAS DE LA CRUZ

## AGREED MINUTES TO AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES RELATING TO THE EMPLOYMENT OF PHILIPPINE NATIONALS IN THE UNITED STATES MILITARY BASES IN THE PHILIPPINES

1. *Article I, Paragraph 1.* The term "special management needs" applies to situations, not all definable in advance, in which the employer, exceptionally, needs, for example:

(a) an employee who is known to be not subject to any personal bias or pressures, for instance in some personnel management functions;

(b) an employee who, perhaps for reasons of long association or experience with a given problem, has the employer's special confidence and who will be known to represent him personally; (c) employees whose work requires them to know and serve American culture and customs; an example might be in some aspects of education of American children.

2. *Article I, Paragraph 2.* The Philippine representatives expressed the hope, noted by the United States representatives, that future steps toward uniformity in the terms of employment of all base employees will be considered. The United States representatives stated, and the Philippine representatives noted, that existing United States laws and regulations now establish terms of employment for all employees, both United States and local nationals, and as to the latter require that their conditions of employment as they relate to wages and compensation shall be based upon prevailing standards and practices of representative progressive employers in the locality which shall be determined by means of periodic technical surveys to be conducted by the United States Armed Forces. The employees, through their recognized labor organizations, shall participate in determining the frequency of and in developing the principles and procedures for such technical surveys, and shall be duly informed of survey results. These principles and procedures shall include the selection of employing firms and comparable positions to be included in the surveys.

3. *Article I, Paragraph 3.* The term "regular workday" shall be understood to mean a workday not in excess of the maximum number of hours allowed without additional compensation under Philippine laws and regulations.

4. *Article I, Paragraph 6.* The United States Armed Forces shall not have responsibility for the enforcement of this provision or the hearing of possible disputes between affected employees and the contractor or concessionaire under this provision.

5. *Article I, Paragraph 7.* The United States Armed Forces may separate an employee at such time as the continuation of his employment is inconsistent with their military requirements, in which case the employee shall be entitled to severance pay unless separation is for cause in accordance with established procedures.

6. *Article II, Paragraph 2.* Should more than one labor organization be recognized as bargaining representative for all the United States military bases such labor organizations shall, in order to facilitate implementation of this Agreement, particularly the uniform and equal application of terms and conditions of employment and personnel policies and administration, undertake joint collective bargaining with the United States Armed Forces. However, collective bargaining on questions unique to one base by the labor organization representing the majority of the employees in such base is not precluded.

7. *Article II, Paragraph 3.* The term "disciplinary action" does not exclude the suspension or discharge of an employee.

8. *Article IV, Paragraph 1.* It shall be the responsibility of Philippine authorities to determine whether contractors and concessionaires performing work for the United States Armed Forces in the Philippines comply with Philippine labor laws and regulations and to enforce compliance with such laws and regulations.

The United States Armed Forces will submit to the Philippine Government periodically a list of all contractors and concessionaires in the bases.

9. *Article VI, Paragraph 1.* The representatives of both Governments stated their intention to take the necessary administrative steps to implement the Agreement at once, in any case not later than six months from the date of signature of the Agreement, and insofar as possible to have effect not later than July 1, 1968.

10. *Article VI, Paragraph 2.* The United States Armed Forces are not precluded from introducing unilaterally future measures to enhance existing working conditions and benefits to employees.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 344314 307